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MEDAN PRESTASI SDN BHD

v.

LAW KOK HONG & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUIT NO: S-22-13-2006]
6 OCTOBER 2011

C ***CONTRACT:*** *Building contract - Termination - Mutual termination - Whether parties agreed to mutual termination - Whether mutual termination proved on balance of probabilities*

CONTRACT: *Guarantee - Construction - Clauses in letters of guarantee - Whether letters of guarantee unconditional, on demand or conditional*

D

CONTRACT: *Guarantee - Demand for payment - Whether contract still subsisting - Breach of clause in letter of guarantee - Failure to comply with conditions in letters of guarantee - Whether negated plaintiff's claim under guarantee*

E

The plaintiff's claim against the second defendant was for the sum of RM34,513,194.26 based upon the first letter of guarantee dated 30 May 2002 and the second letter of guarantee dated 26 February 2003. The plaintiff's claim was in respect of a project F called "Cadangan Pembangunan 2 Blok Apartmen dan Podium Letak kereta bagi Fasa 1A (Package A)" (the project). The main contract was between the plaintiff and the main contractor, Bannes Engineering Sdn Bhd ('BESB') for the contract sum of RM100,740,267.21. Subsequently, when BESB fell behind G schedule due to the delay in progressive payments by the plaintiff and shortage in major material and supplies and labour, the plaintiff and BESB executed a supplementary agreement. It was the plaintiff's contention that the first and second letters of guarantee were unconditional and/or "on demand" guarantees. The H issues for determination in this case were, *inter alia*: (i) whether the first and second letters of guarantee were unconditional guarantees and on demand guarantees or otherwise; (ii) whether the defendants were obliged under the first and second letters of guarantee and the supplementary agreement to bear all the losses

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and damages suffered by the plaintiff; and (iii) whether the plaintiff agreed to a mutual termination of the first and second letters of guarantee as contended by the second defendant.

Held (dismissing plaintiff's claim with costs to be taxed):

(1) In the instant case, the first letter of guarantee was a conditional guarantee and the conditions were contained in cls. 2(a), 2(b), 2(c), 3 and 6. (para 13)

(2) Based on cl. 3 of the first letter of guarantee and cl. 3 of the second letter of guarantee, the plaintiff agreed that any claim the plaintiff have against the second defendant would only be valid if made within seven days after the expiry of the building contract and the supplementary agreement. However, the building contract and the supplementary agreement expired on 31 October 2003 and the date of termination letter of the plaintiff was 15 March 2004. The plaintiff had therefore breached cl. 2 of the first letter of guarantee by its failure to give actual notice to the second defendant of BESB's alleged breach as the notice served on the second defendant on 21 September 2005 was way out of time. (para 17)

(3) It was not disputed that the PAM Form of Contract formed an integral part of the building contract between the plaintiff and BESB. Clause 25.4(iv) of the PAM Form of Contract provided for certification by the architect who must work out the actual cost suffered by the plaintiff, if any. However, the architect, Ar Dr Tan testified that he had never been asked to certify any claims by the plaintiff. It was also established that the delay in the construction works was due to the late payments from the plaintiff and that it was the plaintiff who terminated the main contractor. *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* (refd). (paras 18 & 19)

(4) Plato Construction was appointed to take over the balance work at an extremely higher cost upon the termination of BESB's contract. However, the company delayed in the completion of the balance works. Despite the delay, no action was taken by the plaintiff. In the circumstances, the plaintiff's claim could not be considered *in vacuo* without a consideration of the amount due and owing to the plaintiff by Plato Construction Sdn Bhd. (para 21)

(5) It was agreed, pursuant to a meeting held between the plaintiff and the second defendant, that the building contract and supplementary agreement be mutually terminated. Further, the fact that BESB and many sub-contractors were paid after the termination showed that there was mutual termination. Hence, in light of the evidence, on a balance of probabilities, there was a mutual termination. (para 22)

(6) Notwithstanding the notice to BESB, there had been a serious omission to allow the second defendant the chance to make good the breach of BESB at the material time. Hence, the plaintiff was precluded from making a call for payment under the first letter of guarantee. In order to trigger the applicability of the first and second letters of guarantee, the plaintiff was under a contractual duty to first comply with all the conditions thereunder. The making of a demand simpliciter was not sufficient as these were not on-demand guarantees. Further, the conduct of the plaintiff left much to be desired and was indeed unconscionable. (paras 24 & 25)

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Desa Samudra Sdn Bhd v. Autoways Construction Sdn Bhd & Ors [2009] 1 LNS 298 HC ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] 1 LNS 913 HC ***(refd)***

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2010] 1 LNS 279 HC ***(refd)***

Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd [1997] 1 CLJ Supp 448 HC ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2007] 6 CLJ 18 CA ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***

Kejuruteraan Bintai Kidenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2010] 1 LNS 1646 HC ***(refd)***

Kerajaan Malaysia v. South East Asia Insurance Bhd [2000] 3 CLJ 705 FC ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***
Teknik Cekap Sendirian Berhad v. Public Bank Berhad [1995] 4 CLJ 697 CA ***(refd)***

For the plaintiff - N Rajentharan; M/s GH Tee & Co
For the 2nd defendant - Joanne Lazaroo; M/s Amin, Yap & Co

Reported by S Barathi

JUDGMENT

Lau Bee Lan J:

[1] The plaintiff claims against the three defendants in their capacities as guarantors; the 1st and 3rd defendants have been adjudicated bankrupt by other third parties and the plaintiff is proceeding only against the 2nd defendant. The plaintiff's claim against the 2nd defendant is for the sum of RM34,513,194.26 based upon the 1st letter of guarantee dated 30 May 2002 (exh. P1, bundle B pp. 100-103/ pp. 157-160) ("the 1st letter of guarantee") and the 2nd letter of guarantee dated 26 February 2003 (exh. P8, bundle B pp. 161-163) ("the 2nd letter of guarantee").

[2] The plaintiff's claim is in respect of a project called "Cadangan Pembangunan 2 Blok Apartmen dan Podium Letak Kereta bagi Fasa 1A (Package A) Yang Mengandungi Blok "A" (22 Tingkat) - 251 unit, Blok "C" (22 Tingkat) - 251 unit, Podium "A" Medan Letak Kereta (5 Tingkat) Section 1, Kedai (1 Tingkat) - 8 unit (Nos 1-4, 15, 16, 17, 18), Kolam Renang, Surau, Tadika, Dewan Orang Ramai, Rumah Kelab, Rumah Pengawal, Gelanggang Tenis, Kebuk Sampah dan Empat Buah Pencawang Letrik (A, C, D, F) Di Atas Lot PT 36234" ("the project"). The main contract was made between the plaintiff (employer) and Bennes Engineering Sdn Bhd ("BESB") (main contractor). PW1, Teh Heng Poh, the Chief Operating Officer of plaintiff (until 2004) testified there was a tender exercise and BESB was successful in the said tender. The contract sum was RM100,740,267.21.

[3] The instruments involved in the plaintiff's claim are:

(a) the main agreement between the plaintiff and BESB is in the form of a letter of acceptance dated 26 March 2002 (bundle B pp. 88-98) which incorporated the PAM Form of Contract (Private Edition with Quantities - 1998 - Edition) (bundle B pp. 1-34);

(b) the 1st letter of guarantee;

(c) the supplementary agreement dated 26 March 2003 (bundle B pp. 164-259) executed between the plaintiff and BESB;

(d) the 2nd letter of guarantee.

[4] By consent of the parties the trial proceeded on the determination on the issue of liability only and if liability is established by the plaintiff, the assessment of damages will be heard thereafter. The court has considered the plaintiff's written submission dated 9 May 2011, the 2nd defendant's written submission dated 3 May 2011, the plaintiff's written submission in reply dated 16 May 2011 and the 2nd defendant's submission in reply dated 17 May 2011. On 20 May 2011 the court dismissed the plaintiff's claim with costs and hence the appeal by the plaintiff. The reasons for the decision are as follows.

Issues

[5] (a) (i) Whether the 1st and 2nd letters of guarantee are unconditional guarantees and on demand guarantees or otherwise;

(ii) Whether the defendants are obliged under the 1st and 2nd letters of guarantee and the supplementary agreement to bear all the losses and damages suffered by the plaintiff (see agreed principal issues to be tried marked "C"); and

(b) Whether the plaintiff agreed to a mutual termination of the 1st and 2nd letters of guarantee as contended by the 2nd defendant.

Findings Of The Court

[6] The plaintiff contended on its construction, the 1st and 2nd letters of guarantee are unconditional and/or "on demand" guarantees; all that is required to trigger payments of the losses and damages which were monies guaranteed, *inter alia*, by the 2nd defendant under both the letters of guarantee and are the written demands by the plaintiff pursuant to the terms of the letters of guarantee. The plaintiff relied on the authorities of *Kerajaan Malaysia v. South East Asia Insurance Bhd* [2000] 3 CLJ 705 FC; *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 SC; *Teknik Cekap Sendirian Berhad v. Public Bank Berhad* [1995] 4 CLJ 697 CA; and *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 FC; *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2007] 6 CLJ 18; [2007] 6 MLJ 72 (CA) at p. 76 and *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1 at p. 3).

(a) The plaintiff contended the wordings in the 1st and 2nd letters of guarantee are substantively similar to the wordings in the performance guarantee in *Kerajaan Malaysia v. South East Asia Insurance Bhd (supra)* and *Karya Lagenda Sdn Bhd (supra)*. The plaintiff contended further the 1st and 2nd defendants under the 1st and 2nd letters of guarantee gave guarantee in favour of the plaintiff for the due performance of the contractor, BESB under the building contract and the supplementary agreement.

[7] Learned counsel for the plaintiff relied on a passage in the case of *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913 HC which was adopted by the learned judge in *Kejuruteraan Bintai Kidenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2010] 1 LNS 1646 namely "The law on what constitutes an unconditional bond or guarantee has been extensively analysed and stated by the Federal Court in *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 FC and *Kerajaan Malaysia v. South East Asia Insurance Bhd* [2000] 3 CLJ 705 FC. I wish to add in this connection that the cases do not place much emphasis on the terminology used, whether it be "bond" or "guarantee". Both are interchangeable."

A (a) As correctly submitted by learned counsel for the 2nd defendant the authorities quoted and submitted by the plaintiff are in respect of bank guarantees and performance bonds. This is obvious from the case of *Kejuruteraan Bintai Kidenko Sdn Bhd (supra)* where it pertains to an application for an B interlocutory injunction to restrain the 1st defendant from receiving the proceeds from two performance bonds upon which two calls had been made by the 1st defendant. The 2nd defendant, the guarantor bank indicated that it will abide by any order which the court makes thereto. However in the C instant suit, the scenario involved two letters of guarantee, the PAM form of contract and a supplementary agreement.

[8] In *Kerajaan Malaysia v. South East Asia Insurance Bhd (supra)* the issue before Federal Court and the Court of Appeal is on the D construction of the Gerenti Perlaksanaan and the Insurance Guarantee against advance payment. Paragraphs 1 and 2 of the Gerenti Perlaksanaan reads:

> (a) Jika kontraktor (melainkan layak) mungkir melaksanakan kontrak mengenai apa-apa perkara atau melakukan apa-apa E perlanggaran terhadap kewajipannya di bawah kontrak, maka Kerajaan akan, jika perlu, memberi penggerenti peluang untuk berbincang sebelum sesuatu keputusan dibuat.
>
> (b) Penggerenti akan membayar gantirugi kepada Kerajaan sebanyak dan setakat RM420,645 dalam tempoh tiga bulan F selepas menerima satu notis bertulis mengkehendaki penggerenti membayar kepada Kerajaan apa-apa perlanggaran oleh kontraktor terhadap kewajipannya di bawah kontrak dengan sentiasa tertakluk bahawa segala apa-apa annaun wang bayaran oleh penggerenti tidak melebihi had yang G disebutkan dalam perenggan ini.

(c) With respect to the insurance guarantee, the relevant paragraphs are:

> We, the undersigned, at the request of the contractor H irrevocably undertake and guarantee to the Government that:
>
> 1. We shall pay to the Government free of interest, the sum of RM1,069,035 (Ringgit Malaysia: One Million Sixty-nine Thousand And Thirty Five Only ...) the advance I payment mentioned above or such part thereof as shall

not have already been recovered by the Government pursuant to cl. 3 or 4 hereof and such sum shall be paid on the Government's demand notwithstanding any contestation or protest by the contractor or by ourselves or by any other third party.

2. ...

3. Subject to cl. 4, our responsibility for paying the said sum of RM1,069,035 (Ringgit Malaysia: One Million Sixty-nine Thousand And Thirty Five Only ...) shall be automatically reduced by the amount or amounts of any payments made by us to the Government in respect of this guarantee.

4. The said sum which we guarantee to pay to the Government shall be reduced automatically in proportion to deductions made by the Government out of the progress payments due to the contractor for repayment of the advance payment so made. This Guarantee shall be cancelled immediately after the whole of the advance payment have been released through payments by us or through deductions made out of the progress payments due to the contractor, or after the expiry of the period mentioned in cl. 5, whichever is the earlier.

[9] In *Kerajaan Malaysia v. South East Asia Insurance Bhd* (*supra*), the Federal Court stated it is trite law that in every case the terms of the performance bond need to be carefully considered. I find the text of the 1st and 2nd letters of guarantee is not identical in all respects to the Gerenti Perlaksanaan in *Kerajaan Malaysia v. South East Asia Insurance Bhd (supra)*.

[10] In this instant case, cl. B of the 1st letter of guarantee (bundle B p. 100) provides:

Paragraph 9.1 of the Acceptance provides that the performance Bond to the value of 5% of the contract sum to be furnished by BESB to MPSB under the Tender shall be substituted with adjustment in retention sum for the contract and a personal Guarantee from the Directors of BESB as security for the due performance of the contract by BESB.

(1) Clause 2 (bundle B pp. 101-102) provides:

Subject to Clause 6 below, if BESB shall in any respect fail to execute the Works in conformity with the Contract, unless relieved from the performance by any clause of the

A Contract or by statute or by decision of a court or tribunal of competent jurisdiction including an arbitration tribunal, then the Guarantor shall indemnify the MPSB due to the default by BESB up to the maximum amount RM5,037,013.36 within 30 days after MPSB's written demand, notwithstanding any contestation or protest by BESB but provided always:

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(a) Such demand is accompanied by a written statement by MPSB or his authorised representative indicating those obligations of BESB under the contract in relation to the works in respect of which BESB is in default and certified copies of written notices from MPSB or his authorised representative to BESB inviting attention to such defaults and notice to BESB stating the intention of the MPSB to make a claim under this Guarantee and a statement showing the basis for the amount claimed; and

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(b) The total of all partial demands so made shall not exceed the above mentioned sum of RM5,037,013.36 and the Guarantors' liability to pay MPSB as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

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(c) This guarantee shall lapse immediately upon the cumulative retention sum withheld by MPSB from the progress payment (refer to under Clause 6.3 of the Letter of Acceptance) exceeds the amount of RM5,037,013.36.

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(2) Clause 3 (bundle B p. 102) provides:

Subject to Clause 2(c) above, *this Guarantee shall be valid from the date of issue until the contract expiry date or such extended date as agreed between MPSB and BESB with the concurrence of the Guarantor (hereinafter referred to as the "Validity Period")*. This Guarantee shall not be cancellable during the Validity Period. *Claims, to be effective, must be received within 7 days after the expiry of the Validity period.* (emphasis added)

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(3) Clause 6 (bundle B p. 103) stipulates:

The Guarantor shall be allowed to make good the deficiencies or defaults in performance by BESB and in that event MPSB shall not make a call for payment under this Guarantee. (emphasis added)

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[11] The supplementary agreement was executed between the plaintiff and BESB as BESB was behind schedule in respect of the works due to the late progressive payments by the plaintiff itself, major material and supplies shortage, labour shortage and lack of support from the subcontractors and suppliers of the project. The plaintiff as employer agreed to assist BESB.

(a) The Supplementary Agreement in essence provided that:

1. the contract sum remained at RM100,740,267.21;

2. the construction works were to be completed by 31.10.2003;

3. where it became evident that BESB was unable to complete the construction works by 31.10.2003, MPSB may by written notice, reduce the scope of BESB's work by omitting parts of the construction works from BESB's scope of work and re-awarding the same to another contractor (clause 3.3);

4. that if BESB commits

   (a) breach or default which is a ground for MPSB to determine BESB's employment under the building contract;

   (b) breach of any warranty or covenant under the Supplementary Agreement;

   (c) default in performing any of BESB's obligations under the Supplementary Agreement and such breach or default is not remedied within 14 days from its receipt of MPSB's written notice requiring the same to be remedied, then MPSB would be entitled to terminate the Supplementary Agreement by serving a written notice of termination on BESB.

Upon termination,

(a) BESB's employment under the Building Contract shall be immediately determined;

(b) BESB was to vacate the site and demobilise its staff and workers from the site; and

(c) the consequences of the determination of employment under Clause 25.4 of the conditions of the Building Contract shall apply to the termination of the Supplementary Agreement.

[12] Clause 3 of the 2nd letter of guarantee provides:

> This Guarantee shall be valid from the date of issue until the practical completion of the Works under the Building Contract or such extended date as agreed between the MPSB and BESB with the concurrence of the Guarantors (hereinafter referred to as "the Validity Period"). This Guarantee shall not be cancellable during the Validity Period. Claims, to be effective, must be received within 7 days after expiry of the Validity Period.

(a) Clause 6 of the 2nd letter of guarantee provides:

> The Guarantors hereby confirm their concurrence and consent to the execution of the Supplementary Agreement between MPSB and BESB and **further confirm the continuance of validity and effect of the First Letter of Guarantee** (emphasis added).

[13] It is my considered view that the 1st letter of guarantee is a conditional guarantee and the conditions as submitted by the plaintiff are contained in (i) cl. 2(a), (ii) 2(b), (iii) 2(c) (see para. 10(1) above), (iv) cl. 3 (see para. 10(2) above), (v) cl. 6 (see para. 10(3) above).

[14] As submitted by learned counsel for the 2nd defendant, I find the plaintiff did not lead any evidence:

(a) to show that the total of all partial demands so made did not exceed the sum of RM5,037,013.36 and the guarantors' liability to pay the plaintiff was correspondingly reduced proportionate to any partial demand having been made;

(b) to show if the cumulative retention sum withheld by the plaintiff from the progress payment exceeded the amount of RM5,037,013.36 although the architect, Ar Dr Tan Loke Mun (PW4) was called. Ar Dr Tan was the architect in charge of the project on behalf of Messrs ArchiCentre Sdn Bhd, the architectural consultant company for the project and the superintending officer for the project works.

Validity Period Of The 1st And 2nd Letters Of Guarantee

[15] The plaintiff contended that though the building contract nor the 1st letter of guarantee neither explicitly state what the contract expiry date is, based on cl. 9.2 of the letter of acceptance (that the personal guarantee to be provided by the directors of BESB

shall continue in full force and effect until the certified date of practical completion of the contract) and cl. 7.1 of the letter of acceptance (that the defects liability period shall be 21 months from the date of practical completion), the validity period for the building contract should be construed as until the date of practical completion of the project works. The plaintiff also contended the 2nd defendant has knowledge of the clauses as he was the director who confirmed the acceptance of the terms and conditions of the letter of acceptance by signing the "acknowledgment" of the same.

[16] The plaintiff further contended *vide* cl. 6 of the 2nd letter of guarantee, the 2nd defendant confirmed the continuance of validity and effect of the 1st letter of guarantee. The relevant extensions of time for completion of the contract works until 3 January 2004 were granted by the architect upon the written application of the 2nd defendant and ArchiCentre Sdn Bhd's letters granting extension of time were issued to BESB for the 2nd defendant's attention (bundle B at pp. 410-413). The plaintiff submitted the 2nd defendant has concurred to the granting of the extension of time till 3 January 2004.

[17] In respect of the 1st letter of guarantee, I am inclined to agree with the defendant that based on cl. 3 of the 1st letter of guarantee and cl. 3 of the 2nd letter of guarantee, the plaintiff agreed that any claim the plaintiff may have against the 2nd defendant would only be valid if made within seven days after the expiry of the building contract and the supplementary agreement. Since the validity of building contract and the supplementary agreement expired on 31 October 2003 and the date of termination letter of the plaintiff being 15 March 2004 (exh. P20, bundle B p. 394), the plaintiff has breached cl. 2 of the 1st letter of guarantee by its failure to give actual notice to the 2nd defendant of BESB's alleged breach as the notice served on the 2nd defendant on 21 September 2005 (bundle B pp. 424-425) is way out of time.

[18] In addition, to reiterate, cl. 3 of the 2nd letter of guarantee provides the guarantee shall be valid from the date of issue (26 March 2003) until "the practical completion of the works under the building contract or such extended date as agreed between the plaintiff and BESB with the concurrence of the

guarantors." Since the continuance of the validity and effect of the 1st letter of guarantee is confirmed under cl. 6 of the 2nd letter of guarantee, it is crucial to determine what then is the date of practical completion of the project works.

(a) The plaintiff submitted that the practical completion of the contract works for Block A was only achieved in October 2005 and for Block B it was achieved in February 2006. In this regard the plaintiff relied on the evidence of Ar Dr Tan that:

(i) he was the one who applied to Majlis Perbandaran Petaling Jaya for the issuance of each of the certificates of fitness of occupation for Block A and C and the applications were made by him in the prescribed Form E of Uniform Building By-Laws 1984;

(ii) the Form E for Block A was submitted by him to Majlis Perbandaran Petaling Jaya on 11 October 2005. Whereas the Form E for Block C was submitted by him to Majlis Perbandaran Petaling Jaya on 23 February 2006 and that both Forms were signed by him;

(iii) a certificate of fitness of occupation No. 1961 dated 18 October 2005 (exh. P24) was issued to Block A and a certificate of fitness of occupation No. 2002 dated 7 March 2006 (exh. P25) was issued to Block C, respectively; and

(iv) the plaintiff took possession of Block A in October 2005 and Block C in February 2006 and confirmed that by virtue of the plaintiff taking possession, cl. 16 of the PAM Form of Building Contract had come into operation.

(b) In my view, the plaintiff has not given the complete picture as to the evidence given by Ar Dr Tan, whom I find acted professionally when testifying. In examination-in-chief Ar Dr Tan said they were asked many times by the plaintiff to issue the Certificate of Practical Completion (CPC) but in the light of the quality of works which was not acceptable including some non-essential Certificate of Fitness scope of works, they were not prepared to issue the CPC Ar Dr Tan categorically stated in examination-in-chief "We've to date never issued a Certificate of Practical Completion that states that the building

works were completed to our satisfaction." In cross-examination he explained why he felt the need to stress on the issue of CPC because "The CPC is related to the building contract. It was our opinion that the contracted works had not achieved practical completion and that is why we did not issue the CPC."

(c) Ar Dr Tan referred to cls. 16.1 and 16.1(ii) of the PAM Form of Contract and said (i) they did not issue the CPC; the employer, the plaintiff with the agreement of Plato Construction Sdn Bhd, a subsidiary of plaintiff, took possession of Blocks A and C which were then handed over to the purchasers; (ii) the bypassing of the architect's certification was not a satisfactory state of affairs but was allowed under the building contract.

(d) Ar Dr Tan said "This (taking over possession of the project works) was the path that Medan Prestasi chose to take" which was clarified by him in cross-examination to mean "[T]his project was a high end condo development known as Armanee and that the minimum standards were not good enough for [ArchiCentre Sdn Bhd]". This "minimum standards" according to Ar Dr Tan's evidence-in-chief related generally to minimum standards for the protection of the public and health and safety in the context of the CF issued under the Uniform Building By-laws (UBBL) whilst the CPC is related to the building contract for a specific scope of works.

(e) It is indeed ironical that whilst the plaintiff itself hinged on cl. 9.2 of the letter of acceptance to the effect "... such guarantee to be provided by the directors of BESB shall continue in full force and effect until the certified date of practical completion of the contract, yet there was no such certified date of practical completion of the contract by the architect.

(f) The certification by the architect as to the claims under a PAM Form of Contract is of paramount importance (see *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786 CA at p. 802 paras. 38, 41 & 51; *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2010] 1 LNS 279 HC and *Desa Samudra Sdn Bhd v. Autoways Construction Sdn Bhd & Ors* [2009] 1 LNS 298 HC). As correctly submitted by learned counsel for the 2nd defendant whilst the

A building contract was terminated in March 2004, yet during the trial (15 April 2011), Ar Dr Tan answered he has never been asked to certify any claims by the plaintiff.

(g) It is not disputed that the PAM Form of Contract forms an B integral part of the building contract between the plaintiff and BESB. Based on cl. 25.4(iv) of the PAM Form of Contract as testified by the 2nd defendant (DW1) which provides for certification by the architect who must work out the actual cost suffered by the plaintiff, if any, this means that upon C termination of the contract, the plaintiff can only claim when there is in existence the architect's certification as stated therein.

[19] The 2nd defendant *vide* letter dated 19 March 2004 (bundle B pp. 322-326) testified that the termination was wrongful as the D main reason for the delay in the works of BESB and the sub-contractors was that the plaintiff itself had withheld timely payments to BESB and the sub-contractors. This was substantiated by contemporaneous notices to the plaintiff *vide* letters from BESB dated 5 November 2003, 15 December 2003, E 23 December 2003, 30 December 2003, 8 January 2004, 16 February 2004 and 1 March 2004 (exhs. D26, D31, D32, D27, D28, D29 and D30, bundle B pp. 276-318) whereby BESB had given as at 15 March 2004 the outstanding payment owed by the plaintiff was RM4,760,191.09 (bundle B p. 324). F

(a) The 2nd defendant's case is supported by the evidence from Ar Dr Tan who testified (i) the plaintiff was making direct payment to the domestic sub-contractors (sub-contractors nominated by BESB, the main contractor) bypassing BESB as G early as 2002; (ii) he was partly aware that the delay in the construction works were due to late payments from the plaintiff to BESB and the sub-contractors; (iii) that there were payments due to BESB as at 15 March 2004 (date of termination by the plaintiff) but was unsure of the amount H involved; (iv) as to the reason why he issued the extension of time to BESB *vide* letter dated 4 February 2004 (bundle B p. 412) but on the same day issued a notice of non-completion of even date (bundle B p. 411) and, *inter alia*, said "... [W]e made an assessment of [2nd application for I extension of time] and granted an extension from 31 October 2003 (completion date under supplementary agreement) to 3 January 2004 ... [T]he PAM Form of Contract does not state non-payment or delays in payment as grounds for

extension of time. It works on an understanding that if your don't get paid, the recourse of the main contractor is to terminate."; and (v) he agreed in this instant suit it was upside down in that it was the main contractor who was terminated by the plaintiff.

(b) Further, there is the evidence from Mr Chong Ah Yew (DW3), a director of Everglow Engineering Sdn Bhd, one of the nominated sub-contractors of the project whose job scope was to build the ancillary buildings, club house and TNB sub-station. He testified:

> I wish to add that the payment date on my construction works there was delay. I read one by one, there are 19 items.

No.	Certificate No.	Due Date	Payment Date	Delay/ Prompt
1.	1	11.4.2003	11.4.2003	Prompt
2.	2	20.4.2003	3.6.2003	Delay 45 days
3.	3	5.5.2003	21.6.2003	Delay 47 days
4.	4	20.5.2003	3.7.2003	Delay 44 days
5.	5	5.6.2003	24.6.2003	Delay 20 days
6.	6	20.6.2003	17.7.2003	Delay 28 days
7.	7	5.7.2003	23.7.2003	Delay 19 days
8.	8	20.72003	14.8.2003	Delay 26 days
9.	9	5.8.2003	10.9.2003	Delay 36 days
10.	10	20.8.2003	1.10.2003	Delay 40 days
11.	11	5.9.2003	14.10.2003	Delay 40 days
12.	12	20.9.2003	3.11.2003	Delay 45 days
13.	13	5.10.2003	30.10.2003	Delay 26 days
14.	14	20.10.2003	14.11.2003	Delay 26 days
15.	15	5.11.2003	1.12.2003	Delay 27 days
16.	16	20.11.2003	12.12.2003	Delay 23 days
17.	17	5.12.2003	19.1.2003	Delay 46 days
18.	18	20.12.2003	25.2.2003	Delay 68 days
19.	19	5.1.2004	20.7.2004	Delay 45 days

DW3 said they were paid for all works done and the last payment was on 20 July 2004 and produced an original payment voucher from Plato Construction Sdn Bhd dated 20 July 2004 for RM18,000 (exh. D33). I find DW3 remained steady throughout his cross-examination.

[20] The plaintiff submitted the 2nd defendant is not entitled to rely on the allegation that the plaintiff failed to make direct payments under the supplementary agreement as an excuse for BESB's failure to complete the project works or to go slow with the execution of the contract works and cited *Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448 HC. I find the plaintiff's argument cannot be sustained in the light of all the evidence which I have alluded to above (paras. 19-19.2) where it has been demonstrated that it was the plaintiff itself that had withheld timely payments to BESB and the sub-contractors. Furthermore the importance of timely payments by an employer to a main contractor has been borne out in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 SC.

Plato Construction Sdn Bhd

[21] DW1 testified after BESB's contract was terminated, the plaintiff appointed a sister company, Plato Construction Sdn Bhd to take over the balance work at an extremely higher cost than what BESB could have completed for ie, RM69,372,586.71 and the date of completion was 31 January 2005 but the company took 1 1/2 years to complete.

(a) The appointment of Plato Construction Sdn Bhd was confirmed by Ar Dr Tan who candidly said the letter of award (exh. P23, bundle B pp. 370-377) was issued to Plato at the instruction of the plaintiff. According to Ar Dr Tan, the plaintiff "chose to set up a company called Plato Construction Sdn Bhd ... to undertake the contract" despite the fact "[it] was not a registered building contractor under CIDB (Construction Industry Development Board) Act. All building contractors are required to be registered under the CIDB Act." Further, Ar Dr Tan confirmed the cost of the contract awarded and the date of completion of the balance works. Despite the fact there was delay by Plato Construction Sdn Bhd in completing the balance works, no action was taken by the plaintiff as confirmed by Ar Dr Tan.

(b) Against such a backdrop, I agreed with the defendant that the plaintiff's claim cannot be considered *in vacuo* without a consideration of the amount due and owing to the plaintiff by Plato Construction Sdn Bhd under the letter of award, exh. P23.

Mutual Termination

[22] I now turn to the issue of whether there is mutual termination as alleged by the 2nd defendant. Pursuant to the notice of non-completion and the letter granting extension of time to 3 January 2004 both dated 4 February 2004, the 2nd defendant testified *vide* letter dated 4 March 2004, BESB wrote to the plaintiff regarding the mutual termination of the building contract and the supplementary agreement (bundle B pp. 319-321). At a meeting attended by the 2nd defendant and Mr K Mohanchandran, the chief operating officer of the plaintiff (PW3) on 2 March 2004, it was agreed that the terms of the mutual agreement are:

1. That BESB was to arrange for a meeting with the sub-contractors in the presence of the Plaintiff to settle all the outstanding issues and to determine if the sub-contractors would continue the sub-contract works of the project or whether the Plaintiff would have to award the sub-contract works to some other contractors.

2. BESB was required to arrange for a meeting between the Plaintiff and all the suppliers to settle the issues in respect of the balance supplies and agreements to continue supplying the building materials at the same rate.

3. That all payments outstanding amounting to RM691,619.07 was to be paid by the Plaintiff to BESB.

4. Further, the Plaintiff was to be the beneficiary of the security deposit for the advance of the Proforma Invoices paid for the said project.

5. That all the Indonesian and Vietnamese labourers at the project site were to be sent back to their respective countries and that the cost of such repatriation would be borne by the Plaintiff.

6. That by the mutual termination, the parties would not make any claims in respect of the Building Contract and the Supplementary Agreement.

(a) In cross-examination the plaintiff denied there was any mutual termination and attempted to say based on the 1st paragraph of the defendant's letter (p. 319) it was merely a proposal for mutual termination; but this was disagreed by the defendant. The 2nd defendant in re-examination explained the said letter was written to the plaintiff for the attention of PW3 after the meeting between the defendant and PW3 wherein the defendant was requested to write in such a format because PW3 was not the boss of the plaintiff and he needed to refer the same to his superior. The 2nd defendant further said after the said letter, the requests for payments to the sub-contractors were paid (bundle B p. 366 (22 March 2004) until p. 367 (29 April 2004)). The 2nd defendant said the norm is that there is no payment by the employer to the main contractor after termination (cl. 25.4, p. 22 bundle B) but here BESB and many sub-contractors were paid after the termination because there was mutual termination.

(b) In the light of the following evidence I agreed with the defendant that on a balance of probabilities there was a mutual termination:

(i) After the meeting on 2 March 2004 on mutual termination, the plaintiff issued the termination letter dated 15 March 2004 to BESB and BESB protested *vide* the letter dated 19 March 2004.

(ii) The plaintiff had instructed ArchiCentre Sdn Bhd to issue the letter of award dated 12 March 2004 for the balance works to Plato Construction Sdn Bhd. This seemed odd since a letter terminating the contract of the original main contractor should come before a letter of award to the intended new contractor.

(iii) The 2nd defendant testified that the plaintiff made three payments to BESB on 17 March 2004 in the sums of RM1,419.13, RM107,000 and RM107,000 which is after the date of mutual termination and similarly to many other sub-contractors.

(iv) There is evidence from DW3, Mr Chong regarding the payments made directly to them because of the mutual termination.

Actual Notice And Opportunity To Make Good

[23] The plaintiff submitted there is no requirement under the terms of the 1st and 2nd letters of guarantee that the plaintiff must give actual notice to the 2nd defendant of the breaches committed by BESB except that any letter of demand to be issued must be accompanied with the documents under cl. 2(a) of the 1st letter of guarantee and cl. 2 of the 2nd letter of guarantee. The plaintiff further submitted these requirements were met with.

(a) I find the plaintiff's contention cannot be sustained for the following reasons. The plaintiff ran foul of cl. 2 of the 2nd letter of guarantee by its failure to give actual notice to the 2nd defendant of the alleged breach by BESB. The plaintiff served notices of the alleged breach on BESB dated 25 February 2004 and 15 July 2005 whereas the 2nd defendant only received a demand from the plaintiff dated 21 September 2005.

(b) Clause 3 of the 2nd letter of guarantee provides that the guarantee is only valid if the notice is received while the 1st and 2nd contracts are in existence. As the validity of the 1st and 2nd contracts were only up to 31 October 2003 and terminated on 15 March 2004, thus the plaintiff breached cl. 3 of the 2nd letter of guarantee by only giving notice to the 2nd defendant on 21 September 2005, after the expiry of the 1st and 2nd contracts.

[24] The plaintiff contended (i) based on cl. 6 of the 1st letter of guarantee (see para. 10.3 above) there is no term requiring the plaintiff to give any notice in writing to allow the 2nd defendant to make good defaults in the performance of BESB; (ii) there is no similar provision in the 2nd letter of guarantee; (iii) the defaults committed by BESB are as stated in the plaintiff's letter dated 25 February 2004 (exh. P19, bundle B pp. 392-393) and the 2nd defendant was at liberty to make good the defaults.

(a) In my considered opinion the plaintiff's contention is without merit. Clause 6 of the 1st letter of guarantee categorically states:

> **The Guarantor** shall be allowed to make good the deficiencies or defaults in performance by BESB and in that event MPSB shall not make a call for payment under this Guarantee. (emphasis added).

Therefore notwithstanding the notice to BESB (exh. P19), I agreed with the 2nd defendant's submission there has been a serious omission to allow the 2nd defendant the chance to make good the breach of BESB at the material time. Hence the plaintiff is precluded from making a call for payment under the 1st letter of guarantee. Similarly this opportunity to make good the deficiencies in the performance of BESB before any call for payment under the guarantee is available to the plaintiff extends to the guarantor under the 2nd letter of guarantee by virtue of cl. 6 of the 2nd letter of guarantee that "the guarantors ... further confirm the continuance of validity and effect of the first letter of guarantee."

Conclusion

[25] For the foregoing reasons I find on a balance of probabilities the plaintiff has not proven its claim against the 2nd defendant. I agreed with the 2nd defendant's submission that to trigger the applicability of the 1st and 2nd letters of guarantee, the plaintiff was under a contractual duty to first comply with all the conditions thereunder. The making of a demand simpliciter is not sufficient as these are definitely not on-demand guarantees. Furthermore, based-on the circumstances of the case as a whole, I find the conduct of the plaintiff *vis-a-vis* its dealings with BESB and or the 2nd defendant leaves much to be desired and is indeed unconscionable. Accordingly, the plaintiff's claim is dismissed with costs to be taxes unless otherwise agreed.